BEFORE THE FULL BENCH : ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 676 of 2005-06

(Arising out of the order of learned ACST, Appellate Unit, Bhubaneswar, in First Appeal Case No. AA- 282/BH-II/2004-05, disposed of on dt. 05.03.2005)

Present : **Smt. Suchismita Misra**, **Chairman**
Sri A.K. Dalbehera, 1st Judicial Member
&
Shri Rabindra Ku. Pattnaik, Accounts Member-III

State of Odisha, represented by the Commissioner of Sales Tax, Odisha, Cuttack. . . . Appellant

- V e r s u s –

M/s. K.K. Agrawalla, I.R.C. Village, Bhubaneswar. . . . Respondent

For the Appellant … Mr. M.S. Raman, Addl. S.C. (CT)
For the Respondent … Mr. R.C. Samantaray, Advocate

Date of hearing: 02.12.2019 **** Date of order: 06.12.2019

O R D E R

This appeal is directed against the order dated 05.03.2005 passed by the Asst. Commissioner of Sales Tax, Appellate Unit, Bhubaneswar (in short, "first appellate authority") in First Appeal Case No. AA- 282/BH-II/2004-05 annulling the order of assessment passed by the Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (in short, 'assessing officer') in respect of the dealer-assessee u/S.

12(8) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') for the tax period 1997-98.

2. The facts as revealed from the case record are as follows :

The dealer-assessee M/s. K.K. Agrawalla of IRC Village, Bhubaneswar is a works contractor. He was assessed u/S. 12(4) of the OST Act for the tax period 1997-98 and the said assessment was completed on 31.03.2001. Subsequently the A.G.(Audit) party in course of their audit observed that the said assessee was allowed to get deduction in respect of tax paid materials supplied by the Department to the extent of `43,19,079.00 and also on purchase of tax paid materials i.e. stone chips worth `3,38,334.00 which he utilized in the contract work. Those goods should have been taxed at the stage of assessment and since the same was not done in the instant case there was under assessment of tax relating to this dealer for the relevant tax period. The assessing officer then reopened the case and initiated a proceeding u/S. 12(8) of the OST Act against the dealer-assessee while issuing notice u/S. 11(1) and 12(8) of the OST Act to him. The dealer, however, did not appear before the assessing officer despite service of aforesaid notices on him for which the assessing officer completed the assessment u/S. 12(8) of the OST Act against him exparte to the best of his judgment basing on the materials available on record. In the said

assessment the assessing officer determined the GTO of the dealer at `2,50,81,406.00 and then allowing deduction of `1,12,86,632.70 towards labour and service charges @ 45% and `25,30,600.20 towards cost of materials purchased by the contractor which had suffered OST at the purchase point therefrom determined the TTO at `1,12,64,173.10. The assessing officer calculated tax @8% on the TTO of the dealer which came to `9,01,133.86. He added surcharge @ 10% on the tax payable for the period 01.04.1997 to 14.11.1997 and @ 15% on the tax due payable from 15.11.1997 to 31.03.1998. Thus on calculation of the tax and surcharge to be paid by the dealer-assessee he found the total amount came to `10,15,380.46. He did not impose any penalty u/S. 12(8) of the OST Act and then allowing tax deduction at source amounting to `8,71,329.00 which included dealer's checkgate payment of `7,012.00 ultimately required the dealer to pay the balance amount of `1,44,051.00 as per terms of the demand notice issued to him.

Being aggrieved by the said order the dealer-assessee preferred an appeal challenging the legality of assessment held u/S. 12(8) of the OST Act. It was contended on behalf of the dealer-assessee that he should have been intimated about the reasons for reopening of

the case before completion of the assessment exparte and further he (the dealer) had utilized tax paid purchase of stone chips to the tune of `3,38,334.00 in execution of works contract but the Sales Tax Officer without any basis disallowed his claim and taxed the same at appropriate rate which was not only illegal but also bad in law. The dealer-assessee had claimed deduction towards first point tax paid materials supplied by the contractee but the Sales Tax Officer disallowed the claim and taxed the same which was highly illegal. The first appellate authority after examining the order of assessment, grounds of appeal as well as the materials available on record and averments put forth before him at the time of hearing of the appeal came to a conclusion that the ratio of the decision of Hon'ble Supreme Court of India rendered in the case of Cooch Bihar Contractors' Association and others Vs. State of West Bengal and others, reported in [1996] 103 STC 477 is not applicable to the facts of the present case. He found that the ratio of the decision of the Hon'ble High Court of Orissa rendered in the case of Bharat Heavy Electricals Ltd. and others Vs. Union of India and others, reported in [1988] 71 STC 25 is applicable to the facts of this case. Then keeping in view the observations of Hon'ble High Court of Orissa in the case of State of Orissa Vs. Ugratara Bhojanalaya, reported in [1993] 91 STC 76 he (the first appellate authority) annulled the order of assessment passed by the assessing officer u/S.12(8) of the OST Act

assigning the reason that the demand raised by the latter was without any basis.

3. The State then carried this appeal before the Tribunal on the ground that the order passed by the first appellate authority was illegal since the deduction allowed towards supply of chips by the contractee on cost recovery basis should not have been allowed as chips is a goods to be taxed at the last point of sale.

4. The dealer filed cross-objection in this appeal stating therein that the order of assessment u/S. 12(4) of the OST Act for the tax period 1997-98 was completed on 31.03.2001. The assessment was reopened u/S. 12(8) of the OST Act basing on the A.G. report. The assessment u/S. 12(8) of the OST Act for the tax period 1997-98 was completed on 08.07.2004 raising extra demand of `1,44,051.00. The dealer filed an appeal against the aforesaid order of assessment raising extra demand against him and the first appellate authority allowed his appeal after considering the facts placed before him. The first appellate authority had verified the documents and then following the decision of Hon'ble High Court of Orissa in the case of Bharat Heavy Electricals Ltd. and others (supra) allowed his appeal and reduced the demand to nil. Under such circumstances it was urged on behalf of the dealer-assessee not to disturb the impugned order in any manner.

5. In course of hearing argument learned Addl. Standing Counsel (CT) appearing on behalf of the State strenuously urged before the Bench that the dealer-assessee while executing the works contract had utilized chips which is subject to tax at the last point of sale. Therefore, in the instant case the transfer of goods occurred when those chips were supplied by the contractee for utilization in the works contract. Hence tax on the said materials i.e. chips should have been subjected to tax and recovered from the payment made to the contractor. Thus, allowance of deduction in favour of the dealer-contractor on that count is not correct. In response to the aforesaid contention of learned Addl. Standing Counsel (CT), the Counsel appearing on behalf of the dealer-assessee submitted that in the instant case no tax should be levied from the works contractor when the goods were supplied by the contractee and it was the responsibility of the contractee only to pay the tax, if any, to be levied on such goods.

6. However, in course of hearing and on perusal of the case record it came to light that after completion of assessment against the dealer-assessee u/S. 12(4) of the OST Act on 31.03.2001 the assessing officer had demanded a sum of `5,94,333.52 towards its tax liability. As the dealer had already paid a sum of `8,71,329.00 u/S. 13-AA of the OST Act he (the assessing officer) passed an order for refund

of `2,76,995.00 on proper application and subject to confirmation of payments made by the dealer-assessee. The dealer had challenged the aforesaid order of assessment dated 31.03.2001 before the first appellate authority and the first appellate authority had confirmed the said order of assessment vide his order dated 15.04.2002. Subsequently the revenue reopened the case by initiating a proceeding u/S. 12(8) of the OST Act against the dealer basing upon A.G. (Audit) report. It is revealed from the order of assessment passed u/S. 12(8) of the OST Act that a notice was sent to the dealer which he had also received but when he did not turn up the assessment was completed against him exparte taking into account the materials on record. The State does not place any material before this forum to find out that a notice for initiation of proceeding u/S. 12(8) of the OST Act was issued by the assessing officer indicating the reason as to why he gave a direction for reopening of assessment on the ground of escapement or under assessment. Law is well settled that while giving a direction for initiation of a proceeding of assessment u/S. 12(8) of the OST Act the Sales Tax Officer has to indicate as to why such action is necessary. He must indicate what is the basis for his prima facie conclusion that there has been escapement of assessment or under assessment. Therefore, when the State has come up with this appeal it is the duty of the State-appellant to place all those facts before the Bench to find out that in the

instant case the assessing officer indeed had a basis for his prima facie conclusion that there was escapement of assessment or under assessment in respect of the dealer-assessee during that relevant period. That apart the State also does not furnish any information before this forum to find out if any appeal was/has been filed challenging the order of the first appellate authority wherein he confirmed the order of assessment passed u/S. 12(4) of the OST Act against the dealer-assessee.

7. Under such circumstances it is felt that the conclusion arrived at by the first appellate authority in annulling the order of assessment passed against the dealer-assessee u/S. 12(8) of the OST Act is absolutely justified. Therefore, as per the discussion made above we find no merit in this appeal and as such the same is dismissed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

I agree,

Sd/-
(Rabindra Ku. Pattnaik)
Accounts Member-III